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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, Secretary of Health and Human Services,
Petitioner,

v.

AMERICAN HOSPITAL ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:

RICHARD L. EPSTEIN
American Hospital Association
840 N. Lake Shore Drive
Chicago, Illinois 60611

STUART M. GERSON
EPSTEIN BECKER BORSODY & GREEN, P.C.
1140 19th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 861-0900

Counsel for Respondents American Hospital Association, Hospital Association of New York State, and Strong Memorial Hospital of the University of Rochester

May 25, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Whether a recent congressional enactment, supporting and reaffirming traditional state authority over matters of child abuse, precludes any finding of a significant federal question as to whether section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, authorizes the federal government to intervene in the medical treatment of infants in the absence of any expression of congressional intent to allow such conduct and in view of long-standing agency expressions of the lack of such authority.

2. Whether, under section 504, seriously-ill infants should be considered "otherwise qualified" handicapped individuals or "subject[] to discrimination" in medical treatment decisions when the statute is addressed to vocational and independent-living programs, and child treatment issues traditionally have been matters of state concern.

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The American Hospital Association ("AHA"), the Hospital Association of New York State ("HANYS"), and Strong Memorial Hospital of the University of Rochester, the respondents herein, by their attorneys, hereby oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.[1]

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[1] AHA has no parent or non-wholly-owned subsidiary companies; its only affiliate is the Hospital Research and Educational Trust. HANYS has no parent or non-wholly-owned subsidiary companies; its only affiliate is the Hospital Educational and Research Foundation. Strong Memorial Hospital, which has no affiliates or subsidiaries, is a division of the University of Rochester, a not-for-profit corporation organized under the laws

STATUTES AND REGULATIONS INVOLVED

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disability Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

2. The Child Abuse Amendments of 1984, Pub. L. 98-457, 98 Stat. 1749, *et seq.* (1984), are reproduced, in pertinent part, in the appendix to this brief in opposition (App., *infra,* 1a-12a).

STATEMENT OF THE CASE

A. Introduction

This case involves regulations[2] concerning the medical treatment of seriously-ill infants promulgated by the United States Department of Health and Human Services

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of New York. The American Medical Association ("AMA"), also an appellee in the consolidated proceedings below, is filing a separate brief in opposition.

[2] 45 C.F.R. 84.55 and 45 C.F.R. Pt. 84, App. C, as added by 49 Fed. Reg. 1650-1654 (Jan. 12, 1984), are reproduced in the appendix to the government's petition. *See* Petition App. 53a-72a.

("DHHS" or the "Agency") under the purported authority of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Because these now-invalidated regulations improperly and unlawfully intruded the federal government into the area of medical treatment decision-making, an area of traditional state concern long avoided by Congress,[3] respondents oppose the government's petition for certiorari, which seeks to revive the now-invalidated DHHS regulations.

On May 23, 1984, the Southern District of New York (Brieant, J.), relying upon the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *University Hospital, State University of New York at Stony Brook*, 729 F.2d 144 (2d Cir. 1984), held that DHHS' section 504 regulations were without statutory authority and thus invalid. On June 11, 1984, the district court entered a nationwide injunction barring DHHS from further implementation or enforcement of that regulation or similar activity premised upon section 504. *AHA* v. *Heckler*, 83 Civ. 2638-CLB and consolidated case 84 Civ. 1724-CLB (Memorandum and Order) (S.D.N.Y. May 23, 1984); (Final Judgment) (S.D.N.Y. June 11, 1984).

On December 27, 1984, by unpublished order, the Second Circuit summarily affirmed the judgment of the district court. *AHA* v. *Heckler*, Nos. 84-6211, 6213 (2d Cir. Dec. 27, 1984) (*per curiam*). This petition followed.

B. The History of the Final Regulations At Issue

As enacted, section 504 contained no enforcement directives, investigative procedures or sanctions provisions. In amending the Act in 1974, Congress envisioned that the

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[3] As discussed *infra* at 10-12, Congress has enacted legislation specifically addressing the withholding of medical treatment from seriously-ill infants and has assigned to the states the oversight and enforcement responsibility under that statute. *See* Child Abuse Amendments of 1984, Pub. L. 98-457, 98 Stat. 1749, *et seq.* (1984) (App., *infra*, 1a-12a).

heads of each federal agency would promulgate comprehensive regulations to implement the Act's prohibition. *Cherry* v. *Mathews,* 419 F. Supp. 922, 924 (D.D.C. 1976), and authorities cited therein.

When DHHS (then the Department of Health, Education and Welfare ("HEW")) issued its initial section 504 regulations, which became effective in 1977, the Secretary specifically and correctly recognized that the Act provided no authority for a rule concerning an "institutionalized person's right to receive or refuse treatment." 41 Fed. Reg. 29548, 29559 (July 16, 1976).

However, in a "Notice to Health Care Providers" published on June 16, 1982 (47 Fed. Reg. 26027), DHHS attempted to reverse its long-held position and suggested for the first time that medical treatment decisions involving seriously-ill infants were within the reach of federal intervention under section 504 of the Rehabilitation Act. The notice emphasized that if a withholding of treatment were found to have been based upon handicap, federal funding would be terminated. 47 Fed. Reg. 26027.

Subsequently, on March 7, 1983, without any notice of proposed rulemaking or provision for comment, petitioner promulgated an "interim final rule" requiring hospitals to display posters in conspicuous places in every delivery, maternity and pediatric ward and in each nursery declaring that "discriminatory failure to feed and care for handicapped infants in this facility is prohibited by federal law." 48 Fed. Reg. 9630, effective March 22, 1983. The interim final rule further provided that "any person having knowledge that a handicapped infant is being discriminatorily denied food or customary medical care should immediately contact the Handicapped Infant Hotline," available 24-hours-a-day to all persons who wished to make complaints, including anonymous complaints. Moreover, under the preamble to the rule, DHHS could conduct immediate investigations and make immediate referrals to the Department of

Justice for such legal action as might be found necessary. 48 Fed. Reg. 9630, 9631.

On April 6, 1983, AHA and its cohorts filed their original complaint in the instant case, seeking injunctive relief and alleging that the interim final rule was arbitrary and capricious, in excess of statutory authority, contrary to congressional intent, and impermissibly overbroad, and that its enforcement was causing irreparable harm to the very infants whom the rule purported to aid, as well as parents, doctors, and hospitals. The complaint also alleged that the interim final rule undermined public confidence in hospitals and their medical staffs. At a hearing on April 6, 1983, the district court issued a temporary restraining order prohibiting defendant "from enforcing [the interim final rule] solely to the extent that it purports to require the posting of notices upon the premises of voluntary or municipal hospitals within New York State . . . ." *AHA* v. *Heckler,* 83 Civ. 2638-CLB (Apr. 6, 1983).

On April 14, 1983, the United States District Court for the District of Columbia held that the "interim final rule . . . is invalid as an arbitrary and capricious agency action which fails to meet the standard required under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)." *American Academy of Pediatrics* v. *Heckler,* 561 F. Supp. 395, 399 (D.D.C. 1983). Although that court did not need to determine whether section 504 provided authority for the DHHS rule, it recognized the problem of extending section 504's reach "into such a sensitive area" without "evidence of [congressional] intent" and expressed the hope "that this will be clarified by further congressional action." *Id.* at 401-402.

In response to the invalidation of the interim final rule, petitioner, on July 5, 1983, proposed a somewhat revised rule, which itself was slightly modified, when, on January 12, 1984, DHHS issued the final regulation at issue in the case at bar. Section 504 of the Rehabilitation Act was

the only stated authority for all of the foregoing pronouncements.

The final regulation, which became effective on February 13, 1983, provided, *inter alia,* that hospitals must post notices stating that section 504 prohibits the withholding of "nourishment and medically beneficial treatment" from seriously-ill infants "solely on the basis of their present or anticipated impairments" and providing a confidential 24-hour telephone line for reporting "suspected noncompliance." 45 C.F.R. § 84.55(b), 49 Fed. Reg. 1651. The final regulation further required hospitals to grant DHHS officials "immediate access" to "pertinent records and facilities" when the responsible DHHS official considers such access "necessary to protect the life or health of a handicapped individual" [§ 84.55(a), 49 Fed. Reg. at 1652], and authorized DHHS to take expedited action, without prior notice, to affect compliance where "necessary to protect the life or health of a handicapped individual." § 84.55(e), 49 Fed. Reg. 1652.

Furthermore, under the aegis of state child protective services agencies, the regulation burdened hospitals with substantial new obligations to report to such agencies "suspected instances of . . . medical neglect of handicapped infants," to cooperate with such agencies' on-site investigations, and, for hospitals having infant-care review committees, to consult with the state agencies. § 84.55(c)(1)(i), (iii), and (2).

The record demonstrated that these regulatory requirements would have made it necessary for hospitals to devote their already limited and valuable staff resources to additional recordkeeping and coordination efforts. Specific individuals would have to have been designated and trained to comply with the regulation's requirements. This diversion of resources, particularly during disruptive "on-site investigations," would adversely affect patient care and the efficient administration of the hospital. *See American Acad-*

emy of Pediatrics v. *Heckler,* 561 F. Supp. at 399-401. In fact, during the time before the operation of the regulation was enjoined, such investigations, resultant from posted notices and anonymous hot lines, created morale problems and unnecessary confusion and concern within the hospitals. *Id.* In summary, the regulation imposed upon health care providers unprecedented substantial responsibilities and burdens adversely affecting patient care and hospital administration.

C. The University Hospital Decision

DHHS filed suit on November 2, 1983, in the United States District Court for the Eastern District of New York, alleging that its records-access regulation,[4] promulgated under section 504, authorized the Agency to obtain hospital medical records concerning a seriously-ill infant (known as "Baby Jane Doe"), and that the hospital had violated section 504 by refusing to grant DHHS access to records pertaining to Baby Jane Doe's treatment. The district court, in a summary judgment proceeding on that complaint, ruled against the government and held that DHHS was not entitled to the records. *United States* v. *University Hospital of the State University of New York at Stony Brook,* 575 F. Supp. 607 (E.D.N.Y. 1983), *aff'd,* 729 F.2d 144 (2d Cir. 1984). Because the appellate court decision in that case controlled disposition of the instant case below, a brief discussion of that case is worthwhile.

On February 23, 1984, the United States Court of Appeals for the Second Circuit affirmed the judgment of the Eastern District of New York and ruled that section 504 did not authorize DHHS to gain access to a hospital's medical records concerning the treatment of an infant with serious birth defects. *United States* v. *University Hospital, State University of New York at Stony Brook,* 729 F.2d 144 (2d

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[4] 45 C.F.R. § 84.61 (1982), incorporating 45 C.F.R. § 80.6(c).

Cir. 1984). The court based its decision on findings that, among other things: (1) Congress did not intend section 504 to apply to medical decisions regarding treatment of defective newborn infants; (2) Congress did not intend the federal government to involve itself in such medical decisions; (3) the regulation would impose a particularly onerous affirmative action burden on hospitals;[5] (4) although a defective newborn infant could be considered a "handicapped individual" as defined in 29 U.S.C. § 706(7)(B), such an infant could not be "otherwise qualified" or "subjected to discrimination" within the meaning of section 504;[6] and (5) without explicit language, Congress would not have intended the federal government to intrude into an area within the states' traditional police powers.

Accordingly, the court of appeals held that section 504 does not "apply to treatment decisions involving defective newborn infants," and that, "[u]ntil congress has spoken," it would be improper to permit "the type of [DHHS] investigation that has precipitated this lawsuit." 729 F.2d at 161.

D. The Filing of the Instant Case

In reaching and deciding the ultimate issue in *University Hospital,* the court of appeals expressed its awareness of the final regulation at issue in the case at bar. *See* 729 F.2d at 154. Given the categorical nature of the *University Hospital* holding, it was clear that the regulation necessarily was unlawful and that its implementation, and activities of the government related to it, should be enjoined. Notwithstanding the *University Hospital* decision, however, hospi-

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[5] The court based its affirmative action determination on this Court's admonition in *Southeastern Community College* v. *Davis,* 442 U.S. 397, 411 (1979), that there is no evidence of congressional intent that section 504 would "impose an affirmative action obligation on all recipients of federal funds." *University Hospital,* 729 F.2d at 160.

[6] *University Hospital,* 729 F.2d at 155-57.

tals still were being subjected to federal investigative activity predicated upon anonymous "hotline" calls. Therefore, on March 12, 1984, AHA, HANYS and Strong Memorial Hospital, seeking both declaratory and injunctive relief, amended their complaint to allege that the final regulation was unlawful in view of the *University Hospital* decision, and that its promulgation and implementation were violative of the Administrative Procedure Act.[7]

The district court agreed with respondents and, following the appellate court's May 17, 1984 denial of the government's petition for rehearing and suggestion for rehearing *en banc* in *University Hospital,* held, on May 23, 1984, that the final regulation was adopted without statutory authority and that it must be set aside pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(C). *American Hospital Association* v. *Heckler,* 83 Civ. 2638-CLB and consolidated case 84 Civ. 1724-CLB (Memorandum and Order) (S.D.N.Y. May 23, 1984). In entering its final judgment on June 11, 1984, the court also ordered injunctive relief barring any further attempt to implement or to enforce the regulation or to act in any manner contemplated under the regulation. *American Hospital Association* v. *Heckler,* 83 Civ. 2638-CLB and consolidated case 84 Civ. 1724-CLB, Final Judgment (S.D.N.Y. June 11, 1984).

The Court of Appeals summarily affirmed the district court's judgment in a *per curiam* order dated December 27, 1984. *American Hospital Ass'n, et al.* v. *Heckler,* Nos. 84-6211, 6213 (2d Cir. Dec. 27, 1984). It is that order, along with the appellate court's decision in *University Hospital,* which the government seeks to overturn.

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[7] On the same day, the American Medical Association and others filed a companion case, with essentially the same basis as the instant action. *American Medical Ass'n, et al.* v. *Heckler,* 84 Civ. 1724-CLB. The district court ordered the consolidation of the two matters with the consent of the government.

E. The Child Abuse Amendments of 1984

As is clear from the foregoing, the courts that have examined the issue of whether section 504 authorizes federal intervention in medical treatment decisions concerning seriously-ill infants have agreed that congressional action was required before the federal government could act in this field. Such action (not based upon section 504) was taken in September, 1984, seven months after the appellate court's decision in *University Hospital* and three months after the district court in the instant case enjoined DHHS from enforcing or implementing the section 504 regulations, when Congress enacted the Child Abuse Amendments of 1984 (the "Child Abuse Amendments"), Pub. L. 98-457, 98 Stat. 1749, *et seq.* (1984). This legislation, which amends the Child Abuse Prevention and Treatment Act (42 U.S.C. §§ 5101, *et seq.*), provides—in clear and specific terms—a mechanism for dealing in a comprehensive fashion with the problem which DHHS claims Congress intended to address in section 504 of the Rehabilitation Act, *i.e.*, the withholding of medically indicated treatment (including appropriate nutrition) from disabled infants with life-threatening conditions.

The Child Abuse Amendments condition the states' continued qualification for certain federal grants [*i.e.*, grants to assist the states in developing, strengthening, and carrying out their child abuse and neglect prevention and treatment programs under 42 U.S.C. § 5103(b)] upon the states' development and implementation of procedures or programs within their child protective services systems:

> to provide for (i) coordination and consultation with individuals designated by and within appropriate health-care facilities, (ii) prompt notification by individuals designated by and within appropriate health-care facilities of cases of suspected medical neglect (including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions), and (iii) authority, under State law,

> for the State child protective service system to pursue any legal remedies, including the authority to initiate legal proceedings in a court of competent jurisdiction, as may be necessary to prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions.

Pub. L. No. 98-457, § 122(3), 98 Stat. 1752-53 (App., *infra*, 7a-8a), *amending* 42 U.S.C. § 5103(b)(2).

The Child Abuse Amendments also require the Secretary of DHHS to promulgate regulations implementing the requirements of the provision described above [42 U.S.C. § 5103(b)(2)(K) (as added by Section 122(3) of Pub. L. No. 98-457)], as well as to promulgate model guidelines to encourage hospitals to establish committees:

> which would serve the purposes of educating hospital personnel and families of disabled infants with life-threatening conditions, recommending institutional policies and guidelines concerning the withholding of medically indicated treatment from such infants, and offering counsel and review in cases involving disabled infants with life-threatening conditions.

Pub. L. No. 98-457, § 124, 98 Stat. 1754 (App., *infra*, 10a).

In addition to delineating specific roles for the state and federal governments to address the withholding of medically indicated treatment from disabled infants, the Child Abuse Amendments define such conduct with considerable exactitude:

> the term 'withholding of medically indicated treatment' means the failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician's or physicians' reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions, except that the term does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when, in the treating physician's or physicians' reasonable medical

> judgment, (A) the infant is chronically and irreversibly comatose; (B) the provision of such treatment would (i) merely prolong dying, (ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions, or (iii) otherwise be futile in terms of the survival of the infant; or (C) the provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

Id. at § 121(3) (98 Stat. 1752) (App., *infra*, 6a-7a), *amending* 42 U.S.C. § 5102.

Relevant provisions of the Child Abuse Amendments thus address the issue of medical treatment decisions concerning seriously-ill infants in a detailed and comprehensive manner which recognizes: (a) the *inappropriateness* of requiring the provision of treatment in certain statutorally-specified circumstances; (b) the primacy of the judgments of parents and treating physicians; and (c) the traditional enforcement and oversight role of the states where abuse is suspected.

SUMMARY OF ARGUMENT

Although Congress was aware of the legal challenges to DHHS' section 504-based regulation authorizing federal intervention in medical treatment decisions concerning seriously-ill infants, instead of amending section 504 to make clear an "intent" supporting that regulation, Congress enacted the Child Abuse Amendments of 1984. In doing so, Congress recognized and endorsed the traditional role of the states in addressing such treatment decisions. By enacting the comprehensive and carefully crafted Child Abuse Amendments, Congress made a clear choice of the approach it intended to take as to medical treatment of infants. DHHS now petitions this Court to disregard that congressional choice and seeks to have the Court overturn the appellate court's holding in *University Hospital* that Congress did not intend section 504 to authorize federal government

intervention in medical treatment decisions concerning seriously-ill infants. The enactment of the Child Abuse Amendments, however, has negated the existence of a substantial issue for this Court's resolution, and denial of the government's petition is, therefore, appropriate.

Furthermore, even if Congress had not enacted the Child Abuse Amendments, it is apparent that the *University Hospital* decision was correctly decided: seriously-ill infants are not, within the meaning of section 504, "otherwise qualified handicapped individuals" who may be "subjected to discrimination" with regard to federally-assisted "programs or activities." Neither the statute nor the legislative history supports the government's interpretation of the statute which: (1) is contrary to the Agency's previously long-held interpretation of the statute; (2) is based on a faulty analogy to racial discrimination prohibited under Title VI of the Civil Rights Act; (3) reads the term "otherwise qualified" out of the statute; (4) fails to identify a federally-assisted program or activity that could engage in discrimination prohibited by section 504; and (5) is otherwise illogical. Accordingly, the government's petition for writ of certiorari should be denied.

REASONS FOR DENYING THE GOVERNMENT'S PETITION

A. Because Congress, Recognizing That Legislative Authorization Must Precede Federal Intervention In Medical Treatment Decisions Involving Seriously-Ill Infants and That a Valid Legislative Approach Depended Upon the Primacy of State Authority, Enacted The Child Abuse Amendments, There Is No Significant Question Of Federal Law For This Court To Decide.

Congress' enactment of the Child Abuse Amendments obviates any possibility that the issues presented by DHHS raise "special and important reasons" for granting certiorari as required by Rule 17 of the Supreme Court. Because Congress' intent was clearly expressed in the Child

Abuse Amendments, the correctness of the opinion below does not constitute an "important question of federal law" worthy of this Court's consideration. S. Ct. R. 17(c). Accordingly, as a matter of policy, this Court should exercise its discretion to deny certiorari in this case. *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). (" 'special and important reasons' imply a reach to a problem beyond the academic or the episodic").[8]

When it enacted the Child Abuse Amendments, Congress was fully aware of the courts' expressed refusal to hold that section 504 authorized federal intervention in medical treatment decisions concerning seriously-ill infants absent a clear expression of congressional intent. *See* S. Rep. No. 246, 98 Cong., 2d Sess. 5-8 (1984). Rather than attempting to amend section 504 to "clarify" its intent in that regard, however, Congress, in the Child Abuse Amendments, recognized its appropriate role and, therefore, revalidated and amplified the states' traditional function in dealing with such issues.

The role specified for the federal government in the Child Abuse Amendments was limited to promulgating regulations to ensure that the states fulfilled their statutory responsibilities and guidelines for hospitals to deal with the treatment of seriously-ill infants. Pursuant to Congress' direction, DHHS, on April 15, 1985, published its final rule implementing the Child Abuse Amendments. 45 C.F.R. Part 1340, as added by 50 Fed. Reg. 14887-92 (April 15, 1985). In its preface to the final rule, DHHS conceded that the Child Abuse Amendments reflect Congress' considered choice of the most desirable and workable approach to the

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[8] In *Rice* v. *Sioux City Memorial Cemetery, Inc.*, 349 U.S. 70 (1955), this Court dismissed a writ of certiorari because, although a federal question had been raised, a new state statute prohibiting the action in question would afford a remedy to those in situations similar to that of the petitioner, thereby eliminating the existence of an issue of "public importance." *Id.* at 77. *See also United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 115-16 (1920); *Berry* v. *Davis*, 242 U.S. 468, 469 (1917).

issue of the withholding of medical treatment from seriously-ill infants.

> [T]his legislation was the product of an extraordinary effort on the part of several Senators and Congressmen and representatives of a wide range of medical, right-to-life and disability organizations to forge a substantial consensus on an effective and workable program to assure the provision of appropriate medical care to disabled infants.
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> • • • •
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> It is clear that the legislation represented a careful balance between the need to establish effective protection of the rights of disabled infants and the need to avoid unreasonable government intervention into the practice of medicine and parental responsibilities.

50 Fed. Reg. at 14879.

DHHS also recognized the clear congressional preference for the states—rather than the federal government—to take the lead role. Thus, the Agency emphasized that primary among "several key points [that] emerge from the statute and the legislative history" is that:

> [P]rocedural requirements should build upon existing mechanisms at the state level, rather than creating a new system and a new bureaucracy to respond to reports of known or suspected instances of the withholding of medically indicated treatment from infants with life-threatening conditions.

50 Fed. Reg. at 14881.[9] The Agency further recognized that the states' role rendered unnecessary a confidential 24-hour

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[9] In contrast to the language and legislative history of the Child Abuse Amendments, which, as DHHS concedes, demonstrate a clear congressional intent to "build upon eixsting mechanisms at the state level," 50 Fed. Reg. at 14811, the language and legislative history of section 504 contains no indication that Congress intended that statute to address in *any* way the withholding of treatment from seriously-ill infants. And although § 127(a) of the Child Abuse Amendments (98 Stat. 1754) (App. 11a) provides that the Amendments are not "intended to affect any right or protection under section 504," even the government does not claim (and it could not) that this provision reveals a congressional intent to address infant treatment decisions in section 504.

federal telephone line for reporting the suspected withholding of treatment from seriously-ill infants, although such hot-lines were in fact specified in DHHS' invalidated section 504 regulation. *See* 45 C.F.R. § 84.55(b), 49 Fed. Reg. 1651. Thus, as DHHS stated in its preface to its April 15, 1985 regulations:

> Because the Act so clearly places responsibility for implementation on State CPS [Child Protective Service] agencies, the Department [DHHS] does not see a need to establish a Federal hot-line for reporting suspected instances of medical neglect as requested by some commenters. Such a federal reporting system would not be the most effective in assuring the most prompt reporting to State or local CPS agencies.

50 Fed. Reg. at 14884.

Despite DHHS' recognition that the Child Abuse Amendments represent Congress' considered and carefully-crafted decision concerning the proper allocation of authority for dealing with the treatment of seriously-ill infants, DHHS now maintains that an important federal question exists. The government wants this Court to determine that in section 504, Congress implicitly authorized DHHS to assume the role assigned to the states in the Child Abuse Amendments. To the contrary, Congress has removed the necessity for this Court to consider the potential scope of section 504 by considering the relevant issues and enacting an appropriate statutory scheme pursuant to the Child Abuse Amendments.[10] Thus, there are no "special or important reasons" for the Court to consider the issues presented by

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[10] Because Congress has determined the method for best dealing with the treatment of seriously-ill infants, DHHS' petition is analagous to a request for resolution of a political question, which this Court has long held it will not decide. *See Colegrove* v. *Miller*, 307 U.S. 433 (1939) (questions that are "appropriate for the political departments of the Government . . . are essentially political and not justiciable"). *See also Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976) (courts should refrain from inhibiting "the flexibility of the political branches of government to respond to the changing world conditions").

DHHS. *Rice*, 349 U.S. at 74.

B. Section 504 Does Not Provide Authority for the Federal Government to Supersede the Traditional Role of the States in Dealing With the Medical Treatment Of Seriously-Ill Infants.

In addition to the substantial policy considerations requiring denial of the government's petition, such denial also is required by long-established precedent precluding federal entry into a field traditionally occupied by the states in the absence of a clear congressional mandate.

In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), the Court emphasized that:

> The maintenance in our federal system of a proper distribution between state and national governments of policy authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress.

310 U.S. at 513 (1940). *See also Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), *quoting United States* v. *Bass*, 404 U.S. 336, 349 (1971). Accordingly, this Court "in construing legislation . . . has disfavored in-roads by implication" upon the states' traditional police powers. *Palmer* v. *Commonwealth of Massachusetts*, 308 U.S. 79, 84 (1939).

Applying these principles to a Federal Trade Commission attempt to enforce the Trade Commission Act (15 U.S.C. §§ 44, 45(a)) vis-a-vis purely *intra*state commerce, the Court held that the Commission's interpretation of the Act "would . . . give a federal agency pervasive control over . . . matters heretofore traditionally left to . . . local law," and that "[a]n inroad . . . of such far-reaching import ought to await a clearer mandate from Congress." *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 354-55 (1941). With regard to medical treatment decisions concerning seriously-ill infants, Congress has provided in the Child Abuse

Amendments a clear mandate recognizing and amplifying the states' exercise of their traditional authority in the area of child abuse and neglect. It is thus apparent that DHSS' section 504 regulation constitutes an improper attempt by the federal government to enter a "police power" field long occupied exclusively by the states. Indeed, Congress recognized as much when it enacted the Child Abuse Amendments rather than amending section 504 specifically to authorize the role which DHHS claims under that statute.

The government essentially takes the position that section 504 authorizes it to investigate and intervene in treatment decisions concerning seriously-ill infants regardless of whether the relevant state agency already has taken an active role in such cases. While "state statutes and regulations may be superseded by validly enacted regulations of federal agencies . . . ," *Katharine Gibbs School, Inc.* v. *FTC*, 612 F.2d 658, 667 (2d Cir. 1979), it is also the case that "[w]here the field which Congress is said to have preempted has been traditionally occupied by the State, . . . 'we start with the assumption that the historic police powers of the States were not to be superseded unless that was the clear and manifest purpose of Congress.'" *Jones* v. *Rath Packing Co.*, 430 U.S. at 525, *quoting Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (other citations omitted).

There can be no dispute that the states traditionally have occupied the field of protection of children against abuse. For example, the District Court in *University Hospital* found as a matter of fact that the New York State Child Protective Service was constituted for this very reason, and indeed heavily relied upon its finding that Baby Jane Doe's parents had made an appropriate medical decision. *United States* v. *University Hospital*, 575 F. Supp. at 611, 615.[11] Additionally, most states have enacted a panoply of

[11] Virtually all states have similar child protective services programs.

statutes that prohibit hospitals and physicians from disclosing information gained during treatment without the consent of the patient.[12]

With regard to the necessary confidentiality of medical records, as well as the broader question of the medical treatment of seriously-ill infants, it is apparent that Congress, in enacting section 504, did not intend even to *enter* the field, much less to occupy this area of traditional state concern. *See infra* at — - —. Accordingly, and particularly in view of the Child Abuse Amendments' deference to the states' role, section 504 provides no authority for DHHS to investigate or intervene in treatment decisions concerning such infants.

C. The Court of Appeals Decided The *University Hospital* Case Correctly Because The Government Clearly Does Not Have Authority Under Section 504 To Regulate Or To Intervene As To Medical Treatment Decisions Concerning Infants With Serious Birth Defects.

1. The Plain Meaning of Section 504 Was Properly Interpreted in the *University Hospital* Decision Because the Language of That Statute on its Face Does not Apply to Treatment of Seriously-Ill Infants.

This Court has long held that under the "plain meaning rule," interpretation of a statute "must, in the first instance, be sought in the language in which the act is found, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917). *See also American Tobacco Co.* v. *Patterson,* 456 U.S. 63 (1982); *Southeastern Community College* v. *Davis,* 442 U.S. 397 (1979). Furthermore, with specific regard to section 504 of the Reha-

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[12] *See, e.g.:* New York statutes: CPLR § 4504(a); Education Law § 6509(9); Public Health Law § 2803-c(3)(f) and § 2805-g(3); 8 NYCRR 29.1(b)(8), 10 NYCRR 405.25(a)(9) and 10 NYCRR 405.1026(a).

bilitation Act, this Court, in *Alexander* v. *Choate*, —— U.S. ——, 105 S. Ct. 712, 720 (1985), recently cautioned against stretching interpretations of section 504 beyond "manageable bounds."

Contrary to any reasonable concept of statutory construction, however, the government is in effect requesting this Court to ignore two specific requirements of section 504: (1) that the statute prohibits discrimination against an "otherwise qualified" handicapped individual and (2) that such discrimination must flow from, or be related to, a "program or activity receiving federal financial assistance." 29 U.S.C. § 794. Such an interpretation of section 504 is untenable because the language of that statute clearly sets forth that *only* an "otherwise qualified" handicapped individual may be subjected to discrimination forbidden under that statute, and *only* as to a "program or activity receiving federal financial assistance." 29 U.S.C. § 794. The government's claim that section 504 authorizes a federal role with regard to the treatment of seriously-ill infants rests fundamentally upon a studied evasion of those statutory requirements. And although the government attempts to support its position with an untenable analogy to racial discrimination and various mischaracterizations of the *University Hospital* decision, scrutiny of the government's analysis reveals it to be insupportable.

a. Contrary to the Government's Interpretation, Seriously-Ill Infants Are Not "Otherwise Qualified" Within the Plain Meaning of the Statute.

In attacking the *University Hospital* decision, the government misconceives the thrust of that decision and the facts and circumstances discussed therein. For example, despite the absence of statutory language suggesting *any* applicability of section 504 to medical treatment decisions involving seriously-ill infants, the government blithely

states that "the language of section 504 *clearly prohibits* a [federally assisted] hospital program from withholding nourishment or medically indicated treatment from a handicapped infant solely by reason of his handicap." Petition at 13 (emphasis supplied). Not only is such a prohibition *not* clear from the statutory language, but the government's omission of the term "otherwise qualified" from its description of what section 504 "clearly prohibits" reveals that the government is attempting to avoid the consequences of that statutory prerequisite.

In place of "otherwise qualified," the government apparently would substitute a phrase such as "needing or capable of benefitting from an identifiable course of medical treatment." *See* Petition at 14-15. The government thus defines the term "otherwise qualified handicapped individual" far differently than did this Court in *Southeastern Community College* v. *Davis,* where the Court stated the term means "one who is able to meet all of a program's requirements in spite of his handicap." 442 U.S. at 406.

In fact, the government's reading of the term stretches it so far beyond anything Congress contemplated as to read the term out of the statute. If, as the government observes, "one need not possess any special qualifications to benefit from . . . nourishment [or] medical treatment" (Petition at 15), such nourishment and treatment clearly are not the kind of "programs or activities" as to which Congress prohibited discrimination against *otherwise qualified* individuals. In other words, if Congress did not intend or contemplate that medical treatment decisions would be considered "programs or activities" for which a handicapped individual might or might not be "otherwise qualified," the term "otherwise qualified" cannot be applied in the context of such treatment decisions without destroying the plain meaning of that term. Accordingly, the government's reading of "otherwise qualified" violates the fundamental principles of statutory construction that statutes

should not be be construed to produce absurd results or to prevent giving effect to each term thereof. *See Griffin* v. *Oceanic Contractors, Inc.*, —— U.S. ——, 102 S. Ct. 3245, 3252 (1982); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

Although, as discussed below, the appellate court in *University Hospital* examined congressional intent concerning section 504, it further emphasized the practical problems inherent in the government's "superficial[ly] logic[al]" position, when the court rejected the government's argument that seriously-ill infants can be "otherwise qualified" and "subjected to discrimination" within the meaning of section 504. *Id.* at 156. Thus, as the court stated, "the government's view of 'otherwise qualified' is divorced from the statutory language," as revealed by the cases interpreting the statute, and from the "plain, obvious and rational meaning" of the term, as shown by the fact that:

> In common parlance, one would not ordinarily think of a newborn infant suffering from multiple birth defects as being "otherwise qualified" to have corrective surgery performed or to have a hospital initiate litigation seeking to override a decision against surgery by the infant's parents.

729 F.2d at 156-57.

As the appellate court correctly observed, the Rehabilitation Act, rather than addressing treatment decisions, was designed to increase the participation of handicapped persons in vocational, employment, educational and similar federally-assisted programs and to prohibit discrimination that would deny such individuals access to or participation in such programs. *Id.* at 155-59.[13] This Court recently echoed that analysis in *Alexander* v. *Choate*, when it

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[13] As the Act's declaration of purpose makes clear:

> The purpose of this chapter is to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living.

29 U.S.C. § 701.

stressed that section 504 was part of "major vocational-rehabilitation legislation" (105 S. Ct. at 718 n. 13) having as some of its paramount goals the elimination of architectural barriers, barriers to access to public transportation, special education or rehabilitation services, and discriminatory job qualification procedures. *Id.* at 719. This Court did *not* include in its enumeration of the Rehabilitation Act's goals the prevention of the withholding of medical treatment from seriously-ill infants, and it is apparent that the statute's plain meaning does not encompass the role that DHHS claims for itself.

b. There Are No Federally-Assisted Programs or Activities Which Could Engage in Discrimination Prohibited by the Plain Meaning of Section 504.

Even if it is assumed *arguendo* that seriously-ill infants can be "otherwise qualified," there exists no federally-assisted "program or activity" which could discriminate against such infants within the meaning of section 504. As the government concedes, neither the court of appeals in *University Hospital* nor the courts below in the instant case resolved the issues concerning the nature or identity of the "program or activity receiving federal financial assistance," although the government suggests that the *sources* of such federal assistance would include Medicare and Medicaid funds as well as "Hill-Burton and other construction funds." *See* Petition at 15-16, n. 12. It is apparent, however, that there is *no* federally-assisted program or activity whose conduct with regard to treatment decisions concerning seriously-ill infants could constitute discrimination prohibited under section 504, and that the statute, therefore, cannot apply to such treatment decisions.

Even if *all* of a hospital's programs and activities were deemed to be federally-assisted,[14] because hospitals are

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[14] Although there is substantial doubt that hospitals are recipients of federal financial assistance by virtue of their receipt of Medicare and Medicaid payments (*see Cook* v. *Budget Rent-A-Car Corp.*, 502 F. Supp.

not empowered to *make* treatment decisions, a hospital simply could not engage in discrimination in such decisions. In addition, despite the government's claim that section 504 requires hospitals to initiate steps to override parental decisions, hospitals likewise lack legal authority to require that parents choose a different course of treatment than the one they have determined to pursue. On the contrary, hospitals always are prepared to render those services which parents, in consultation with the treating physicians, determine to be medically necessary.

Certainly, the government does not, and could not, contend that parents are federally-assisted programs or activities,[15] and the federal government would have no authority under section 504 to take any action, remedial or punitive, with regard to parental treatment decisions.

The government's attempt to suggest that "nourishment" or "corrective surgery" constitutes federally-assisted programs or activities for purposes of section 504 (Petition at 4-15) is similarly specious. Aside from the fact that parents, rather than hospitals, are the parties who decide whether such nourishment or treatment will be furnished to a seriously-ill infant, the government's position

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494 (S.D.N.Y. 1980)), the appellate court in *University Hospital* found it unnecessary to decide (although it is assumed) that such payments do constitute federal assistance to recipient hospitals. 729 F.2d at 151. In addition, it could not be said that the Medicare and Medicaid legislation provided hospitals unambiguous notice that, as a condition of receiving such payments, they would be subject to DHHS' claimed authority to investigate and intervene in medical treatment decisions concerning seriously-ill infants. *See Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981). While the AHA Respondents do not abandon their arguments that the DHHS section 504 regulations are invalid on these grounds, as well as for all the reasons addressed in this brief in opposition, the AHA Respondents will not burden this brief with a discussion of these grounds not addressed by the court in *University Hospital*.

[15] Indeed, the Secretary has conceded that parents are not recipients of federal financial assistance. 49 Fed. Reg. at 1653.

that there are no "qualifications" necessary for an individual to benefit from such nourishment or treatment makes it clear that they are not the kinds of "programs or activities" as to which Congress prohibited discrimination in section 504. *See supra* at 21-22.

In view of the government's avoidance of the statutory requirements that individuals be "otherwise qualified" and that the alleged discrimination occur vis-a-vis a federally-assisted "program or activity," it is apparent that it cannot establish that section 504 has any application to medical treatment decisions concerning seriously-ill infants.

2. Congress Did Not Intend Section 504 to Apply to Treatment Decisions Involving Seriously-Ill Infants.

Because the Court of Appeals in *University Hospital* determined that the language of section 504 does not make "crystal clear its intended scope,"[16] and that it does not "plainly apply"[17] to medical treatment decisions involving seriously-ill infants, it looked to congressional intent to determine the scope of the statute's applicability. In doing so, the court of appeals complied with this Court's admonition that "[w]here . . . resolution of a question of federal law turns on a statute and the intention of Congress, we first look to the statutory language and then to the legislative history if the statutory language is unclear." *Blum* v. *Stenson*, —— U.S. ——, 104 S. Ct. 1541, 1548 (1984). *See also United States* v. *Turkette*, 452 U.S. 576, 580 (1981); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975).

The appellate court's *University Hospital* decision turns primarily on the issue of congressional intent, which the court determined after an exhaustive review of the legislative history. 729 F.2d at 157-61. As the court summarized,

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[16] 729 F.2d at 161, *quoting Allen* v. *State Board of Elections*, 393 U.S. 544, 570 (1969).

[17] 729 F.2d at 159, *quoting United States* v. *Jones*, 607 F.2d 269, 273 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980), and *citing* other cases.

"[o]ur review of the legislative history has shown that congress never contemplated that section 504 of the Rehabilitation Act would apply to treatment decisions involving defective newborn infants . . . ." *Id.* at 161 (citation omitted).

In concluding that Congress did not intend section 504 to authorize governmental involvement in medical treatment decisions concerning such infants, the court looked not only to the absence of expression of such intent in congressional deliberations concerning the Rehabilitation Act (729 F.2d at 157-58), but also to the "post-enactment legislative history" (including congressional oversight hearings) (*id.* at 159), and to *other* congressional enactments which, as the court observed, express the will of Congress that "determinations regarding the quality and appropriateness of medical treatment should not be undertaken by federal officials." *Id.* at 160 (citations omitted). As the court made clear, it could not presume, "[i]n view of this consistent congressional policy *against* the involvement of federal personnel in medical treatment decisions . . . that congress intended [by enacting section 504] to repeal its earlier announcements in the absence of clear evidence of congressional intent to do so." *Id.* (citations omitted, emphasis supplied). Accordingly, the court emphasized that, contrary to "the government's new interpretation, . . . neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." *Id., quoting Southeastern Community College,* 442 U.S. at 411 (other citations omitted).

Equally significantly, stressing the virtual impossibility of determining that a medical decision concerning a handicapped condition is or is not discriminatory when that condition is (or is related to) the subject of the decision, the court of appeals highlighted the illogicality of the govern-

ment's attempt to analogize such decisions to those involving racial discrimination. 729 F.2d at 157. And as this Court recently warned, although section 504 is patterned after the anti-discrimination provision of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, "too facile an assimilation of Title VI law to §504 must be resisted." *Alexander* v. *Choate,* 105 S. Ct. at 716-17 n. 7. Because Congress perceived discrimination against the handicapped "to be most often the product, not of invidious animus, but . . . of benign neglect" (*id.* at 718), the government's attempt to read Title VI and section 504 *in pari materia* is misguided. *Id.* at 717, n. 11.

Thus, the appellate court concluded that neither the statute's plain meaning nor its legislative history support the government's contention that section 504 authorizes federal government intervention in medical treatment decisions concerning seriously-ill infants. The government's petition for certiorari should, therefore, be denied.

3. The *University Hospital* Court Properly Determined That DHHS' Current Position Concerning the Applicability of Section 504 Is Not Entitled to Deference.

While courts often defer to an agency's interpretation of the statute it administers, "[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose." *Morton* v. *Ruiz,* 415 U.S. 199, 237 (1974) (citations omitted). In addition, to be entitled to any weight, such agency interpretations must also be *consistently held. United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 718 (1975); *Morton* v. *Ruiz,* 415 U.S. at 237; *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205, 210 (1972).

Because, as described above, the government's position is supported by neither the plain meaning of section 504 nor congressional intent (as revealed by the legislative history of section 504 and the subsequent enactment of

the Child Abuse Amendments), the government's recently-announced view that section 504 permits intervention in infant treatment decisions lacks consistency with congressional purpose, and therefore must be rejected. *Morton* v. *Ruiz,* 415 U.S. at 237. *See also Southeastern Community College,* 442 U.S. at 411.

Further, DHHS' inconsistent interpretation of section 504 precludes deference to the Agency's current interpretation. In 1976, the Secretary (of what was then HEW) recognized that section 504 provided no authority for a rule concerning an "institutionalized person's right to receive or refuse treatment." 41 Fed. Reg. 29548, 29559 (July 16, 1976). Then, beginning in 1982 DHHS attempted to reverse its long-held position regarding the inapplicability of section 504 to the treatment of seriously-ill infants. *See supra* at 4-7. Against this background, the court of appeals in *University Hospital* properly refused to defer to DHHS' position, recognizing that the Agency's "current view of the scope of the statute is flatly at odds with the position originally taken by HEW." 729 F.2d at 152. *See also id.* at 152-54.

Not only is the Agency's current interpretation of section 504 inconsistent with its original position, but it is also inconsistent with positions that it has stated in other contexts. For example, based on its unsupported claim that Congress intended section 504 to apply to medical treatment decisions concerning seriously-ill infants, as well as upon a rigid analogy to racial discrimination, the government insists that:

> [Because] a federally-assisted hospital would not be free under Title VI to decline to perform surgery to remove an intestinal obstruction in an infant because of his race, . . . [i]t is equally unlawful under Section 504 for the hospital to decline to perform the same surgery on an infant because of his handicap . . . .

Petition at 19. DHHS, however, has elsewhere taken the position that *no* violation of section 504 would arise in regard to the failure to treat an infant so seriously ill that such treatment is "futile" or would do no more than "temporarily prolong the act of dying." 49 Fed. Reg. at 1653. In essence, then, the government contends that when a seriously-ill infant reaches a certain level of defect, the asserted protection of section 504 no longer applies, and that it is for the *federal government* to determine when this point has been reached. However, neither the language of section 504 nor its legislative history provides any support for the government's position.

Similarly, although the Secretary has made it clear, in Appendix C to the final rule ("Guidelines Relating to Health Care for Handicapped Infants"), 49 Fed. Reg. at 1653, that "[s]ection 504 and the provisions of this part [*i.e.*, the final rule] are not applicable to parents," *id.*, the government in its petition contends that it has authority under section 504 to require a hospital to "initiate steps to override" certain parental decisions. Petition at 25.[18]

Because DHHS' current interpretation of section 504 is inconsistent with congressional purpose and with other Agency positions, the court in *University Hospital* properly refused to defer to the Agency's current interpretation.

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[18] The government's contention (Petition at 24-25) that no "affirmative action" obligation would be imposed by requiring hospitals to "initiate steps" (including litigation if necessary) to override parental decisions is simply inaccurate. As DHHS emphasized in the preamble to its final rule, the Agency believes that section 504 requires a hospital "to seek judicial review itself, so as to trigger the system provided by State law to determine whether [a] parental decision should be honored." 49 Fed. Reg. at 1631. In addition, DHHS suggested that hospitals should condition physicians' staff privileges upon the doctors' agreement to abide by the requirements of section 504. *Id.* at 1637. Such requirements clearly extend hospitals' responsibilities beyond any obligation the hospitals may have not to discriminate.

CONCLUSION

Contrary to the government's contentions, the appellate court in *University Hospital* correctly decided that section 504 was not intended to address medical treatment decisions concerning infants with birth defects. In any event, to the extent there is a cognizable issue with regard to such treatment decisions, Congress has chosen to address any possible issues related to such decisions not in section 504, but rather through the Child Abuse Amendments, which recognize and expand the traditional role of the states. Finally, in seeking, by regulation and otherwise, to intervene in medical treatment decisions regarding seriously-ill infants and to gain access to medical records concerning such infants, the government is proceeding contrary to well-established principles, and in the absence of legitimate, unambiguous, and narrowly-drawn statutory or regulatory authority.

Accordingly, for all the reasons set forth above, the AHA Respondents respectfully urge this Court to deny the government's petition for writ of certiorari.

Respectfully submitted,

Of Counsel:

RICHARD L. EPSTEIN
American Hospital Association
840 N. Lake Shore Drive
Chicago, Illinois 60611

STUART M. GERSON
EPSTEIN BECKER BORSODY & GREEN, P.C.
1140 19th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 861-0900

Counsel for Respondents American Hospital Association, Hospital Association of New York State, and Strong Memorial Hospital of the University of Rochester

May 25, 1985

APPENDIX

APPENDIX

PUBLIC LAW 98-457 [H.R. 1904]; October 9, 1984

CHILD ABUSE AMENDMENTS OF 1984

An Act to extend and improve provisions of laws relating to child abuse and neglect and adoption, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Child Abuse Amendments of 1984".

TITLE I—AMENDMENTS TO CHILD ABUSE PREVENTION AND TREATMENT ACT

PART A—PROGRAM IMPROVEMENTS

The National Center on Child Abuse and Neglect

SEC. 101. (a) Section 2(a) of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101(a)) (hereinafter in this title referred to as "the Act") is amended by striking out "Health, Education, and Welfare" and inserting in lieu thereof "Health and Human Services".

(b) Clauses (6) and (7) of section 2(b) of the Act are amended to read as follows:

"(6) study and investigate the national incidence of child abuse and neglect and make findings about any relationship between nonpayment of child support and between various other factors and child abuse and neglect, and the extent to which incidents of child abuse and neglect are increasing in number and severity, and, within two years after the date of the enactment of the Child Abuse Amendments of 1984, submit such findings to the appropriate Committees of the Congress together with such recommendations for admin-

istrative and legislative changes as are appropriate; and

"(7) in consultation with the Advisory Board on Child Abuse and Neglect, annually prepare reports on efforts during the preceding two-year period to bring about coordination of the goals, objectives, and activities of agencies and organizations which have responsibilities for programs and activities related to child abuse and neglect, and, not later than March 1, 1985, and March 1 of each second year thereafter, submit such a report to the appropriate Committees of the Congress.".

(c) Section 2(c) of the Act is amended by striking out "The Secretary may carry out his functions under subsection (b) of this section" and inserting in lieu thereof "The functions of the Secretary under subsection (b) of this section may be carried out".

(d) Section 2 of the Act is further amended by inserting after subsection (d) the following new subsection:

"(e) No funds appropriated under this Act for any grant or contract may be used for any purpose other than that for which such funds were specifically authorized.".

Definitions

SEC. 102. Section 3 of the Act is amended—

(1) by inserting "(including any employee of a residential facility or any staff person providing out-of-home care)" after "by a person";

(2) by striking out the period at the end thereof and inserting in lieu thereof a semicolon; and

(3) by adding at the end thereof the following new clause:

"(2)(A) the term "sexual abuse" includes—

"(i) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having a child assist any other person to engage in, any sexually explicit conduct (or any simulation of such conduct) for the purpose of producing any visual depiction of such conduct, or

"(ii) the rape, molestation, prostitution, or other such form of sexual exploitation of children, or incest with children,

under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary; and

"(B) for the purpose of this clause, the term 'child' or 'children' means any individual who has not or individuals who have not attained the age of eighteen.".

Demonstration or Service Programs and Projects

SEC. 103. (a) Section 4(b)(2)(E) of the Act is amended by striking out "his" and inserting in lieu thereof "and the child's".

(b) Section 4(b)(3) of the Act is amended to read as follows:

"(3)(A) Subject to subparagraph (B) of this paragraph, any State which on the date of enactment of the Child Abuse Amendments of 1984 does not qualify for assistance under this subsection may be granted a waiver of any requirement under paragraph (2) of this subsection—

"(i) for a period of not more than one year, if the Secretary makes a finding that such State is making a good-faith effort to comply with any such requirement, and for a second one-year period if the Secretary makes a finding that such State is making substantial progress to achieve such compliance; or

"(ii) for a nonrenewable period of not more than two years in the case of a State the legislature of which meets only biennially, if the Secretary makes a finding that such State is making a good-faith effort to comply with any such requirement.

"(B) No waiver under subparagraph (A) may apply to any requirement under paragraph (2)(K) of this subsection.".

(c) Section 4 of the Act is further amended—

(1) by redesignating subsection (e) as subsection (f); and

(2) by inserting after subsection (d) the following new subsection:

"(e) The Secretary, in consultation with the Advisory Board on Child Abuse and Neglect, shall ensure that a proportionate share of assistance under this Act is available for activities related to the prevention of child abuse and neglect.".

Authorization of Appropriations

SEC. 104. (a) Section 5(a) of the Act is amended—

(1) by striking out "(a)" after "SEC. 5.";

(2) by inserting after the first sentence the following new sentence: "There are hereby further authorized to be appropriated for the purposes of this Act $33,500,000 for fiscal year 1984, $40,000,000 for fiscal year 1985, $41,500,000 for fiscal year 1986, and $43,100,000 for fiscal year 1987."; and

(3) in the second sentence by striking out "this section" and all that follows through the end of such subsection, and inserting in lieu thereof "this section except as provided in the succeeding sentence, (A) not

less than $9,000,000 shall be available in each fiscal year to carry out section 4(b) of this Act (relating to State grants), (B) not less than $11,000,000 shall be available in each fiscal year to carry out sections 4(a) (relating to demonstration or service projects), 2(b)(1) and 2(b)(3) (relating to information dissemination), 2(b)(5) (relating to research), and 4(c)(2) (relating to training, technical assistance, and information dissemination) of this Act, giving special consideration to continued funding of child abuse and neglect programs or projects (previously funded by the Department of Health and Human Services) of national or regional scope and demonstrated effectiveness, (C) $5,000,000 shall be available in each such year for grants and contracts under section 4(a) for identification, treatment, and prevention of sexual abuse, and (D) $5,000,000 shall be available in each such year for the purpose of making additional grants to the States to carry out the provisions of section 4(c)(1) of this Act. With respect to any fiscal year in which the total amount appropriated under this section is less than $30,000,000, funds shall first be available as provided in clauses (A) and (B) in the preceding sentence and of the remainder one-half shall be available as provided for in clause (C) and one-half as provided for in clause (D) in the preceding sentence.".

(b) Section 5(b) of the Act is repealed.

Advisory Board on Child Abuse and Neglect

SEC. 105. (a) The first sentence of section 6(a) of the Act is amended by striking out "including" and all that follows thereafter through "Administration,".

(b) Section 6(a) of the Act is further amended by inserting at the end thereof the following sentence: "The Advisory Board may be available, at the Secretary's re-

quest, to assist the Secretary in coordinating adoption-related activities of the Federal Government.".

(c)(1) Section 6(b) of the Act is repealed.

(2) Subsection (c) of section 6 of the Act is redesignated as subsection (b).

Coordination

SEC. 106. Section 7 of the Act is amended by striking out "between" and inserting in lieu thereof "among".

PART B—SERVICES AND TREATMENT FOR DISABLED INFANTS

New Definition

SEC. 121. Section 3 of the Act is further amended—

(1) by striking out "this Act the term 'child abuse and neglect'" and inserting in lieu thereof the following: "This Act—

"(1) the term 'child abuse and neglect'";

(2) by striking out the period at the end thereof and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding after clause (2) (as added by section 102(3) of this Act) the following new clause:

"(3) the term 'withholding of medically indicated treatment' means the failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician's or physicians' reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions, except that the term does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when, in

the treating physician's or physicians' reasonable medical judgment, (A) the infant is chronically and irreversibly comatose; (B) the provision of such treatment would (i) merely prolong dying, (ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions, or (iii) otherwise be futile in terms of the survival of the infant; or (C) the provision of such treatment would be virtually futile in terms of the survivial [sic] of the infant and the treatment itself under such circumstances would be inhumane.".

New Basic State Grant Requirement

SEC. 122. Section 4(b)(2) of the Act (42 U.S.C. 5103(b)(2)) is amended—

(1) by striking out "and" at the end of clause (I);

(2) by striking out the period at the end of clause (J) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by inserting after clause (J) the following new clause:

"(K) within one year after the date of the enactment of the Child Abuse Amendments of 1984, have in place for the purpose of responding to the reporting of medical neglect (including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions), procedures or programs, or both (within the State child protective services system), to provide for (i) coordination and consultation with individuals designated by and within appropriate health-care facilities, (ii) prompt notification by individuals designated by and within appropriate health-care facilities of cases of suspected medical neglect (including instances of withholding of med-

ically indicated treatment from disabled infants with life-threatening conditions), and (iii) authority, under State law, for the State child protective service system to pursue any legal remedies, including the authority to initiate legal proceedings in a court of competent jurisdiction, as may be necessary to prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions.".

Additional State Grants and Assistance for Training, Technical Assistance, and Clearinghouse Activities

SEC. 123. (a) Section 4 of the Act is further amended by—

(1) redesignating subsection (c) as subsection (d), subsection (d) as subsection (e), and subsection (e) as subsection (f); and

(2) inserting after subsection (b) the following new subsection:

"(c)(1) The Secretary is authorized to make additional grants to the States for the purpose of developing, establishing, and operating or implementing—

"(A) the procedures or programs required under clause (K) of subsection (b)(2) of this section;

"(B) information and education programs or training programs for the purpose of improving the provision of services to disabled infants with life-threatening conditions for (i) professional and paraprofessional personnel concerned with the welfare of disabled infants with life-threatening conditions, including personnel employed in child protective services programs and health-care facilities, and (ii) the parents of such infants; and

"(C) programs to help in obtaining or coordinating necessary services, including existing social and health

services and financial assistance for families with disabled infants with life-threatening conditions, and those services necessary to facilitate adoptive placement of such infants who have been relinquished for adoption.

"(2)(A) The Secretary shall provide, directly or through grants or contracts with public or private nonprofit organizations, for (i) training and technical assistance programs to assist States in developing, establishing, and operating or implementing programs and procedures meeting the requirements of clause (K) of subsection (b)(2) of this section; and (ii) the establishment and operation of national and regional information and resource clearinghouses for the purpose of providing the most current and complete information regarding medical treatment procedures and resources and community resources for the provision of services and treatment for disabled infants with life-threatening conditions (including compiling, maintaining, updating, and disseminating regional directories of community services and resources (including the names and phone numbers of State and local medical organizations) to assist parents, families, and physicians and seeking to coordinate the availability of appropriate regional education resources for health-care personnel).

"(B) Not more than $1,000,000 of the funds appropriated for any fiscal year under section 5 of this Act may be used to carry out this paragraph.

"(C) Not later than 210 days after the date of the enactment of the Child Abuse Amendments of 1984, the Secretary shall have the capability of providing and begin to provide the training and technical assistance described in subparagraph (A) of this paragraph.".

(b) Section 4 of the Act is further amended by adding after paragraph (3) the following new paragraph:

"(4) Programs or projects related to child abuse and neglect assisted under part B of title IV of the Social Se-

curity Act shall comply with the requirements set forth in clauses (B), (C), (E), (F), and (K) of paragraph (2).".

Regulations and Guidelines

SEC. 124. (a)(1) Not later than 60 days after the date of the enactment of this Act, the Secretary of Health and Human Services (hereinafter in this part referred to as the "Secretary") shall publish proposed regulations to implement the requirements of section 4(b)(2)(K) of the Act (as added by section 122(3) of this Act).

(2) Not later than 180 days after the date of the enactment of this Act and after completion of a process of not less than 60 days for notice and opportunity for public comment, the Secretary shall publish final regulations under this subsection.

(b)(1) Not later than 60 days after the date of the enactment of this Act, the Secretary shall publish interim model guidelines to encourage the establishment within health-care facilities of committees which would serve the purposes of educating hospital personnel and families of disabled infants with life-threatening conditions, recommending institutional policies and guidelines concerning the withholding of medically indicated treatment (as that term is defined in clause (3) of section 3 of the Act (as added by section 121(3) of this Act)) from such infants, and offering counsel and review in cases involving disabled infants with life-threatening conditions.

(2) Not later than 180 days after the date of the enactment of this Act and after completion of a period of not less than 60 days for notice and opportunity for public comment, the Secretary shall publish the model guidelines.

Report on Financial Resources

SEC. 125. The Secretary shall conduct a study to determine the most effective means of providing Federal finan-

cial support, other than the use of funds provided through the Social Security Act, for the provision of medical treatment, general care, and appropriate social services for disabled infants with life-threatening conditions. Not later than 270 days after the date of the enactment of this Act, the Secretary shall report the results of the study to the appropriate Committees of the Congress and shall include in the report such recommendations for legislation to provide such financial support as the Secretary considers appropriate.

Implementation Report

SEC. 126. Not later than October 1, 1987, the Secretary shall submit to the appropriate Committees of the Congress a detailed report on the implementation and the effects of the provisions of this part and the amendments made by it.

Statutory Construction

SEC. 127. (a) No provision of this Act or any amendment made by this Act is intended to affect any right or protection under section 504 of the Rehabilitation Act of 1973.

(b) No provision of this Act or any amendment made by this Act may be so construed as to authorize the Secretary or any other governmental entity to establish standards prescribing specific medical treatments for specific conditions, except to the extent that such standards are authorized by other laws.

(c) If the provisions of any part of this Act or any amendment made by this Act or the application thereof to any person or circumstances be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected thereby.

Effective Dates

SEC. 128. (a) Except as provided in subsection (b), the provisions of this part or any amendment made by this part shall be effective on the date of the enactment of this Act.

(b)(1) Except as provided in paragraph (2), the amendments made by sections 122 and 123(b) of this Act shall become effective one year after the date of such enactment.

(2) In the event that, prior to such effective date, funds have not been appropriated pursuant to section 5 of the Act (as amended by section 104 of this Act) for the purpose of grants under section 4(c)(1) of the Act (as added by section 123(a) of this Act), any State which has not met any requirement of section 4(b)(2)(K) of the Act (as added by section 122(3) of this Act) may be granted a waiver of such requirements for a period of not more than one year, if the Secretary finds that such State is making a good-faith effort to comply with such requirements.

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